printed, Tr. 1034). At the deposition hearing, Siddall refused to answer any questions dealing with matters "about which he was asked, or matters which were presented to the grand jury, until such time as relevant portions of the grand jury transcript are available" (Royall's statement at deposition, not printed, Tr. 1116). The Government then moved for an order compelling Siddall to answer and in its brief in opposition, dated November 9, 1955, Procter for the first time urged a hearing on its motion to inspect the grand jury transcript (Brief in opposition to motion to compel answers, not printed, Tr. 2037–2038).

On November 25, 1955, the court ordered Siddall to answer all but five of the questions. At the same time it stated that it would hear the pending motion for production of the grand jury transcripts. Three days later the other appellees filed similar motions for discovery of the entire grand jury transcript[4] (R. 128, 133, 134).

The Government opposed the motions, but after argument the court on April 17, 1956, ruled that appellees were entitled to inspect and copy the entire transcript (R. 207). The court held (R. 213; see R. 208) that production of the grand jury transcript would serve the "ends of justice"; and that the defendants thus had shown "good cause" (within the meaning of Rule 34) therefor, because (1) the Gov-

[4] The Procter, Lever and Association motions apparently were filed under Rule 34 of the Federal Rules of Civil Procedure. Colgate's motion was filed under Rule 6 (e) of the Federal Rules of Criminal Procedure (R. 183).

No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey granting appellees' motions to compel production of grand jury transcripts (R. 206) and denying the Government's motion for reconsideration (R. 257) are reported at 19 F. R. D. 122 and 247, respectively.

JURISDICTION

The judgments of the district court dismissing the complaint were entered on September 13, 1956 (R. 325–327), and the notice of appeal was filed in that court on October 4, 1956. This Court, on February 25, 1957, postponed further consideration of its juris-

diction to the hearing on the merits (R. 565). The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29) as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2 and 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in

equity to prevent and restrain such violations. * * *

The pertinent provisions of the Federal Rules of Civil Procedure (28 U. S. C.) as amended December 27, 1946, and promulgated under the authority of 28 U. S. C. 2072, are as follows:

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, * * * not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control * * *.

Rule 37. Refusal to Make Discovery: Consequences.

* * * * *

(b) Failure to Comply with Order.

* * * * *

(2) Other Consequences. If any party * * * refuses to obey * * * an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing * * *, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that * * * the contents of the paper * * * or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, * * *

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders * * *.

Rule 41. Dismissal of Actions.

* * * * *

(b) Involuntary Dismissal: Effect Thereof. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 6 (e) of the Federal Rules of Criminal Procedure (18 U. S. C.) promulgated under the authority of 18 U. S. C. 3771, is as follows:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the

vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

QUESTIONS PRESENTED

Following a federal grand jury investigation of possible criminal violations of the Sherman Act, in which no indictment was returned, the United States filed a civil suit under that Act. During pretrial proceedings, the district court directed the United States to permit the defendants to inspect and copy the transcript of the testimony of all witnesses who appeared before the grand jury. When the United States refused to permit such inspection, the court dismissed the suit. The following questions are presented:

1. Whether the United States, by proposing that the court amend its original order directing disclosure of the grand jury transcript to provide that the consequence of non-compliance would be dismissal of the complaint, thereby invited, or consented to, the dis-

ernment "has used and will continue to use the transcripts while preparing for trial" (R. 213), (2) "the transcripts would be useful to defendants during their preparation for trial" (*ibid.*) and (3) the defendants could not otherwise obtain the information (R. 217). The court further held (R. 213–214) that none of the reasons commonly given for maintaining the secrecy of grand jury proceedings was applicable in this case.

After further proceedings, set out in detail below, *infra*, pp. 18–20, the court, on August 21, 1956, entered an amended order which provided that unless the United States, on or before August 24, 1956, produced at the offices of the Department of Justice, and permitted each of the defendants or their counsel to inspect and copy, "all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the Grand Jury, the Court will enter an order dismissing the complaint herein" [5] (R. 322).

The United States did not produce the grand jury transcript for inspection and copying, and on September 13, 1956, the district court entered judgments dismissing the complaint because of such non-production (R. 325–327).

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[5] The court's original order, entered on July 24, 1956, directed the United States to permit the defendants to inspect and copy the grand jury transcript within 30 days, but did not state the consequences of non-compliance. The circumstances surrounding the amendment of the order upon the Government's motion are set forth in the Argument, *infra*, pp. 18–20.

SUMMARY OF ARGUMENT

I. The district court's original production orders directed the United States to produce within 30 days the entire grand jury transcript. Prior to expiration of that period, the Government filed a motion requesting the court to amend the orders to provide that, if production were not made, the court would dismiss the complaint. The Government explained that it was proposing the amendment to avoid requiring the Attorney General to choose between alternatives which would "involve a serious violation of an important public interest." Thus, it was pointed out that non-compliance would place the Government's chief law enforcement officer in the position of disobeying an outstanding court order, while voluntary dismissal of the case would mean sacrificing the broad public interest in securing determination of the issues raised by the antitrust complaint.

The defendants did not oppose the amendment, and the court entered an amended order as proposed by the Government. The Government did not produce, and as a consequence the court entered its judgments of dismissal, from which this appeal is taken.

We submit that in proposing amendment of the order to specify that the consequence of non-compliance would be dismissal of the complaint, rather than one of the other remedies which the court could have utilized under Rule 37 (b) of the Federal Rules of Civil Procedure (such as citation for contempt), the Government neither invited, nor consented to, the dismissal which followed such non-production.

A. When the Government filed its motion for amendment, the court had long since decided the substantive issue against the Government, *i. e.*, it had determined to compel disclosure of the grand jury transcript. The only remaining issue was what the consequence of non-disclosure would be. In proposing the amended order, the Government did no more than ask the court to specify in advance what the consequence would be, and to suggest that dismissal of the complaint rather than some other measure would be the appropriate remedy. As the court itself recognized, the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith.

If the production order as originally entered had provided for dismissal in case of non-compliance or if, without amendment of the order, the court on its own motion had dismissed following non-compliance, the Government unquestionably could have appealed such dismissal. Cf. *United States* v. *Cotton Valley Operators Committee,* 339 U. S. 940; *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793, note 1 at 794–795. The result should be no different because the court selected dismissal as the consequence of non-compliance (instead of one of the other measures authorized by Rule 37 (b)) at the Government's suggestion.

B. *Thomsen* v. *Cayser,* 243 U. S. 66, fully supports our contention that the United States did not consent to dismissal of the complaint by proposing the amended order. There, on rehearing, the court of

appeals, after having first reversed a trial court judgment in favor of plaintiffs and remanded for a new trial, entered final judgment directing dismissal of the complaint. This was done at plaintiff's request in order to expedite an appeal to this Court. This Court in turn held that plaintiffs had not consented to a judgment against them "but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay" (243 U. S. at 83).

Similarly, in the instant case the United States did not consent to the ruling on production (which it strenuously opposed), but sought only a specification of the remedy which the court would select in case of non-compliance. Here, as in *Thomsen,* the proposed change went only to the form of the judgment, and not to the substance of the adverse ruling.

C. Appellees argue that permitting appeal would permit review of interlocutory orders, on the theory that any party objecting to an interlocutory order could take a voluntary non-suit and then obtain review thereof by appealing from the dismissal. But the argument rests on the erroneous assumption that the Government consented to dismissal by proposing the amended order.

The orders of dismissal were final orders because they ended the case, and review thereof necessarily also embraces review of the earlier interlocutory orders upon which the final orders rest. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322.

II. The bases of the district court's holding that appellees had shown "good cause" (within the mean-

ing of Rule 34 of the Federal Rules of Civil Procedure) were (1) that the Government was using the transcript in preparing the civil case for trial; (2) that the transcript would be "useful" to appellees in their trial preparation; and (3) that "none of the reasons" for maintaining the traditional secrecy of grand jury transcripts was applicable in this case. We believe that these rulings rest upon a misconception of both the "good cause" standard under Rule 34 and the policy upon which grand jury secrecy rests.

A. In *Hickman* v. *Taylor*, 329 U. S. 495, this Court enunciated the standards governing discovery in situations where there are strong public policies weighing against disclosure. It ruled that, because of the "well recognized" "policy against invading the privacy of an attorney's course of [trial] preparation," discovery of his "work product" might be had only upon a showing that "relevant and non-privileged facts" whose "production * * * is essential to the preparation of one's case" would otherwise "remain hidden in an attorney's file", or that "the witnesses are no longer available or can be reached only with difficulty" (pp. 511, 512).

The public policy against breaching the secrecy of grand jury proceedings is certainly no less strong than the policy of preserving the privacy of a lawyer's "work product." It has been an historic principle that grand jury proceedings shall be conducted in secrecy and without subsequent exposure of the testimony taken. One of the basic reasons for maintaining that secrecy is "to encourage free and

untrammeled disclosures by persons who have information with respect to the commission of crimes" (*United States* v. *Rose*, 215 F. 2d 617, 628 (C. A. 3)). That policy applies no less because the grand jury has been discharged without returning an indictment.

Grand jury witnesses frequently testify as informers, and they obviously would be less likely to do so if such testimony were to be made public. This consideration is particularly significant in the antitrust field where the witnesses frequently are persons who, because of their economic relationships with, and dependence upon, business firms under investigation, might hesitate to speak freely if their testimony were likely to be revealed. Indeed, in this case 24 of the 28 grand jury witnesses were past or present officers or employees of appellees, or were connected with firms which presumably had some business relationships with them.

In recognition of this important policy that grand jury secrecy must be maintained so "that those who testify may feel free to speak the truth without reserve" (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9)), the courts (except for the decision below) consistently have rejected attempts by the defendants in Government civil antitrust cases to obtain wholesale discovery of grand jury transcripts. Even in a criminal case, a defendant can obtain the transcript only upon a clear showing that "strict application" of the traditional secrecy rule "would defeat the ends of justice" (*United States* v. *Rose*, *supra*), and he then obtains disclosure only to the extent clearly necessary.

A fortiori, disclosure of grand jury testimony may be ordered in a civil case only if a party makes an unusually strong, and a particularized, showing that he cannot effectively try his case without breaching such secrecy. Appellees, though they seek the entire transcript, have utterly failed to make any showing of need.

C. Appellees' bare allegations that the "information" contained in the transcript is "necessary" to their defense and that "pertinent" matters would not become known unless access thereto were granted, plainly were insufficient to establish "good cause." Since such stereotyped "showings" could always be made, treating them as sufficient to justify production would read the "good cause" requirement out of Rule 34.

The claim that "no practicable alternative to such discovery exists" has no support in the record. Appellees could have obtained all pertinent facts without recourse to the grand jury transcript. The Government had furnished appellees with lengthy and detailed statements of the facts upon which it was relying, and had disclosed to them a substantial portion of its documentary evidence. Appellees conceded that they knew the identity of "most if not all" of the witnesses who had appeared before the grand jury, and the Government had offered to disclose their names. There was no showing that those witnesses were unavailable, or that appellees could not interview them, or take their depositions, or that they had not done so. Indeed, most of the appellees conceded that they could take such depositions.

The situation here is comparable to *Hickman* v. *Taylor, supra,* 329 U. S. at p. 509, where, "[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already * * * or is readily available to him direct from the witnesses for the asking." Indeed, it appears that what appellees were seeking through discovery of the grand jury transcript was not to ascertain the facts upon which the Government's case was based (since they either already had such facts or could readily obtain them), but to ascertain exactly how prospective witnesses had cast their testimony.

Appellees have not shown that their case is the "rare situation justifying production" (*Hickman* v. *Taylor, supra,* at p. 513) of traditionally secret grand jury transcripts. The standard of "good cause" applied by the district court in this case—that the transcript would be "useful" to appellees in preparing for trial—would permit such easy and unlimited access to grand jury transcripts as seriously to interfere with the effective functioning of the grand jury as a law enforcement institution.

ARGUMENT

I. BY PROPOSING THE AMENDED ORDER, THE GOVERNMENT NEITHER INVITED, NOR CONSENTED TO, DISMISSAL OF THE COMPLAINT

Appellees contend (Proctor Motion to Dismiss or Affirm, pp. 8–19; Colgate Motion to Dismiss or Affirm, pp. 8–24; Lever Motion to Dismiss or Affirm, pp. 2, 9–16, 21–23; Association Motion to Dismiss or Affirm,

pp. 2–3) that the United States, by requesting the district court to amend its earlier orders directing production of the grand jury transcript (entered over the Government's vigorous objection) to provide that non-production would result in dismissal of the action, thereby invited or consented to dismissal. Discussion of this contention requires a brief statement of the circumstances surrounding the entry of the amended order.

After the district court had held that the defendants were entitled to inspect and copy the grand jury transcript (R. 218), and had denied reconsideration (R. 261), it entered its original production orders (dated July 23, 1956) (R. 262–267). Those orders merely directed the United States to produce within 30 days, and to permit the defendants to inspect and copy, the entire transcript of the grand jury testimony. The orders did not specify, however, what the consequence of non-disclosure would be.

On August 16, 1956 the Government filed a motion requesting the court (1) to amend the orders of July 24, 1956 to provide that, if production were not made, the court would dismiss the complaint, or, alternatively, (2) if amendment were denied, to stay the order pending the filing of an appeal therefrom or an application for an extraordinary writ (R. 317). The Government explained that it was proposing the amendment in order to avoid requiring the Attorney General to choose among alternatives which would "involve a serious violation of an important public interest" (R. 333). Thus, it was pointed out, non-compliance would place the Government's chief law

enforcement officer in the unseemly position of disobeying an outstanding court order, while voluntary dismissal would mean sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief (*ibid.*). The Government further pointed out (R. 321–322) that the alternative relief of staying the order "would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity," and that neither alternative would prejudice the defendants.

The defendants did not oppose the Government's proposed amendment (R. 324, 334–336), and the court entered an amended order providing that, unless the Government produced the transcript by August 24, 1956, "the Court will enter an order dismissing the complaint herein" (R. 323).

On September 6, 1956, the court sent a letter to all counsel inquiring whether the Government had produced "as directed in the last paragraph of the amended order," and stating that "[i]f the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361). In response, the Government advised the court "that plaintiff has not produced the grand jury transcripts for inspection by the defendants" (R. 362).

On September 13, 1956, the court entered separate judgments of dismissal as to each defendant, which recited that the plaintiff had failed to produce the grand jury transcript referred to in the amended

order (R. 325–328). It is from those judgments of dismissal that this appeal has been taken.

We submit that the foregoing facts show that in proposing the amendment of the order to specify that non-production would result in dismissal of the complaint, rather than some other consequence (*e. g.*, a contempt proceeding), the Government neither invited, nor consented to, the dismissal which followed such non-production.

A. When the Government filed its motion for amendment of the production orders, the court had long since decided the substantive question against the Government, *i. e.*, it had determined to compel disclosure of the grand jury transcript. The only remaining issue was what the consequence of non-disclosure would be. Under Federal Rule of Civil Procedure 37 (b), the court could have taken various measures, including "staying further proceedings until the order is obeyed," dismissing the action, arresting Government counsel for disobedience, or citing them for contempt. But since the orders gave the Government 30 days within which to produce, final selection of the appropriate measure awaited the expiration of that period.

In proposing the amended order, the Government did no more than (1) ask the court to state in advance what the consequence of non-compliance would be, and (2) suggest an appropriate measure, namely, dismissal of the complaint rather than the stay of further proceedings, arrest or citation for contempt. It distorts the whole chronicle of events to construe

the Government's suggestion as either an invitation or consent to the dismissal which actually followed non-compliance. Contrary to Procter's view (Procter Motion, p. 9), the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith.[6] Indeed, Procter recognized that the Government was not seeking dismissal by proposing the amended order. For it stated that it did not oppose the Government's "proposed relief of production *or* dismissal" (R. 324, 334, emphasis added).

If the production orders as originally entered had provided for dismissal in case of non-compliance, unquestionably the Government could have appealed a judgment of dismissal entered as a result of non-compliance, and could have tested the production order on such appeal. Cf. *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940 (affirmed by an equally divided court); *United States* v. *Zucca*,

[6] Although Lever states (Motion, pp. 9, 21) that the dismissal orders were not imposed by the court as a remedy for non-compliance, the court itself viewed such orders as resulting from the Government's non-production, not from invitation or consent to dismissal. Thus, on September 6, 1956 (after the time for production had expired), the court sent a letter to all counsel inquiring whether the Government had produced "as directed in the last paragraph of the amended order," and stating that "[i]f the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361). Similarly, the judgments of dismissal themselves recite that the complaint was being dismissed because the Government had not produced (R. 325–328).

351 U. S. 91.[7] Similarly, if the original orders had not been amended and the court, upon non-compliance, had dismissed on its own motion, the production ruling could have been tested on appeal from such dismissal. Cf. *Cotton Valley* case, *supra; United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, n. 1 at 794–795. The result should be no different because the court indicated in advance that it would adopt the Government's suggestion (in which appellees acquiesced) and specify dismissal as the consequence of non-compliance (instead of one of the other measures authorized by Rule 37 (b)). The decision thus to amend the order was made by the court, not by the Government; and the court, of course, could have rejected the Government's proposed amendment, either on the ground that the suggested measure was inappropriate, or that it should not be announced prior to non-compliance.

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[7] In *Cotton Valley*, the district court directed the Government to produce FBI reports and, when the Government refused to do so, dismissed the complaint for failure to comply with the production order (Record on appeal, No. 490, Oct. Term, 1949, pp. 213–218, 220). The Government appealed from the judgment of dismissal, and this Court noted probable jurisdiction (*id.* p. 267). In *Zucca*, the district court entered an order dismissing the Government's complaint in a denaturalization proceeding for failure to file an affidavit of good cause, on condition that if within 60 days the Government filed such affidavit the complaint would be reinstated. The Government did not file the affidavit, and the court then entered a final order of dismissal, from which the Government appealed. Record on appeal, No. 213, Oct. Term 1955, pp. 20, 22. The court of appeals and this Court upheld the dismissal on the merits.

Procter's argument (Procter motion, p. 10) that the Government's proposed amendment was "intended to result in the dismissal of the action and nothing less" misses the point. For it was so intended only in the sense that the Government sought specification that dismissal, rather than some other measure, would be the consequence of non-compliance with orders that the Government consistently opposed as invalid.

B. *Thomsen* v. *Cayser*, 243 U. S. 66, fully supports our contention that the United States did not consent to dismissal of the complaint by proposing the amended order.

In *Thomsen*, the court of appeals had reversed a judgment in favor of plaintiffs entered in a private treble damage antitrust suit, on the ground that, under decisions of this Court, the plaintiffs had not established a violation of the Sherman Act. However, since those decisions had been rendered subsequent to a contrary ruling by the court of appeals in a prior appeal in the case, which ruling the plaintiffs had followed in trying their law suit, the court concluded that it would be unduly prejudicial to plaintiffs to reverse with instructions to dismiss. Accordingly, it remanded for a new trial.

Plaintiffs sought rehearing. They requested that, instead of a judgment for a new trial, "judgment final be rendered upon the record, or questions of law, such as are presented by the case upon the record as it stands, be certified to the Supreme Court for final decision" (Record on Appeal, *Thomsen* v. *Cayser*, No. 2, October Term, 1916, p. 209). The court of appeals,

stating that plaintiffs "prefer[red] instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they [might] carry the case to the Supreme Court without further delay" (*id.*, p. 210), granted rehearing, recalled the mandate, and reversed the judgment with instructions to enter an order dismissing the complaint (*id.*, p. 211; see 243 U. S. 66 at 76). The court of appeals then allowed a writ of error to this Court.

Defendants moved in this Court to dismiss the writ of error on the ground, *inter alia*, that the "judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent" (243 U. S. at 82).[8] This Court, however, summarily denied the motion to dismiss, holding that

> The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might

[8] Defendants contended: "[P]laintiffs insist that the judgement [of the trial court] should have been affirmed: but do not claim that, if it was right to reverse the judgment, it was wrong to direct a dismissal instead of a new trial. Indeed they were estopped from doing so, because this substitution was at their instance and with their assent. They made known to the Court, after it had ordered a new trial, that they preferred a dismissal, and the Court made the substitution accordingly." [Supplemental Brief for Defendants in Error on Reargument, p. 3.]

come to this court without further delay. [243 U. S. at 83.] [9]

Similarly, in the instant case the United States did not consent to the ruling on production (which it opposed throughout the proceedings), but sought only a specification as to what the consequence of non-compliance would be. The Government repeatedly emphasized to the court that it strongly opposed the court's ruling directing disclosure of the grand jury transcript, and it advised the court, when the original production orders were entered, that it would decline to produce (R. 330). Moreover, it emphasized that, in proposing the amended order, it was not "waiving any rights to challenge the substance of the ruling on appeal," but was "merely trying to change the form of the order, to put it in terms that we can get effective appellate review of the order without being in the position of having to disobey the order as a condition to testing it" (R. 334). The Government's proposal thus went only to the form of the judgment, not its substance.

Indeed, this is an even stronger case than *Thomsen* v. *Cayser* for holding that there was no consent to dismissal. For there the plaintiffs proposed a change in the form of the order merely "so that they might come to this court without further delay" (243 U. S. at 83). In the instant case, however, the Government proposed a change in the form of the order

[9] The same procedure was upheld in *Federal Baseball Club* v. *National League*, 259 U. S. 200, 208, and *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208, 210. See, also, *McGill* v. *Commercial Union Assur. Co.*, 5 F. 2d 589, 591 (C. A. 4).

not to expedite an appellate ruling, but to further the public interest by avoiding the "unseemly position" of requiring the country's chief law enforcement official to choose among alternative courses of conduct, each of which would have "involved [d] a serious violation of an important public interest" (R. 333-334; see *supra,* pp. 18–19). Furthermore, in *Thomsen* the judgment of dismissal was entered as the direct result of the plaintiff's motion to amend, whereas in the instant case, as the court's own statements make clear (see *supra,* n. 6, p. 21), dismissal resulted from the Government's noncompliance with the amended order rather than from its proposal to amend.

It is immaterial that in *Thomsen* the plaintiffs sought a change in a judgment which had finally disposed of the case, whereas here the Government sought a change in a judgment to indicate what such disposition would be. The significant fact in *Thomsen* is that since the court already had decided the substantive issue adversely to the plaintiffs, the latter did not waive their rights to appeal from that determination by proposing a change in the form of the judgment in which that determination was reflected. The same reasoning is applicable to the case at bar, and it compels the conclusion that the Government did not waive its right to appellate review of the court's production ruling by proposing a

change in the form of the order in which that ruling was formalized.[10]

Appellees rely (Procter Motion, pp. 15–16; Colgate Motion, pp. 14–15; Lever Motion, p. 23) on *United States* v. *Babbitt*, 104 U. S. 767, to support their contention that the Government invited dismissal by proposing the amended order. There an Army officer brought suit against the United States for military pay on the theory that his service as a West Point cadet was to be counted for longevity purposes. The Court of Claims decided against the officer and filed "an elaborate opinion to that effect" (p. 768). However, "after the decision was announced, a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal" (*ibid.*). This Court affirmed the judgment on the ground that "[t]he consent to the judgment below was in law a waiver of the error now complained of" (*ibid.*).

In *Babbitt*, therefore, the Government consented to a change in the substance, and not just the form, of

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[10] Appellee Procter seeks to distinguish "[c]ases such as" *Thomsen* v. *Cayser* on the ground that "[t]hey are not regarded as appeals from consent judgments" (Procter Motion, n. 10, pp. 8–9; see Colgate Motion, footnote, p. 15). The reason they are not so regarded, however, is because the proposal to change the judgment went only to its form, not its substance. As we have shown in the text, that also is true in the instant case.

the order. Its effect was to convert a favorable decision into an adverse ruling. Here, however, the Government had lost on the merits (*i.e.*, production had been directed), and it proposed merely a change in the form of the order in which that adverse ruling was reflected. This case, therefore, is controlled by *Thomsen* rather than by *Babbitt*.

C. Appellees argue (Procter motion, 18–19; Colgate motion, 21–24; Lever motion, 14–17, 19–20) that permitting appeal in the circumstances of this case would circumvent the rule against review of interlocutory orders. The argument is that "any plaintiff who objects to an interlocutory order will be able to take a nonsuit or obtain a voluntary dismissal under Rule 41 (a), and by appealing from the dismissal order, will be able to obtain review of the interlocutory order" (Lever motion, 14; see Colgate motion, 21–22).

The argument is without substance, however, because it rests on the assumption that the Government invited or consented to dismissal—an assumption which, as we have shown, is erroneous. An order of dismissal clearly would have been appealable if the in case of non-compliance or if the court, on its own in case of non-compliance or if the court, on its own motion, had so directed (see *supra*, pp. 21–22). In those cases, the Court would review the merits of the production order under the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of

the earlier order upon which it depends. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 346–349, 354. The principle is equally applicable here.

In the instant case, the judgments of dismissal are final orders, and therefore reviewable, because they "ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794–795, note 1.[11] They are no less final because their validity depends upon an earlier interlocutory order. Appellees' basic quarrel is with the fact that the district court accepted the Government's suggestion, in which they acquiesced, that dismissal, rather than some other measure, be specified as the consequence of non-compliance.

In final analysis, appellees' contention thus is that because the court initially directed production without specifying the consequence of non-compliance, the Government, in order to appeal such ruling, was required to "await * * * the decision of the lower court as to what, if any, penalty or remedy it chose to impose or adopt" for non-compliance (Lever mo-

[11] They would be appealable even if the dismissals were without prejudice. *Wallace & Tiernan* case, *supra*. We believe, however, that they were with prejudice. Rule 41 (b) provides for "Involuntary dismissal" for "failure of the plaintiff * * * to comply with * * * any order of court," and states that "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule * * * operates as an adjudication upon the merits." Since the court's judgments of dismissal do not specify that they were without prejudice, they were with prejudice. *Daley* v. *Sears, Roebuck & Co.*, 90 F. Supp. 562 (N. D. Ohio).

tion, 16);[12] and that the Government lost its right to such appeal by requesting the court to state the consequences of non-compliance.

We know of no legal principle or policy consideration which would justify such a harsh and arbitrary result. On the contrary, we think that since the Attorney General is charged with protecting the public interest in the conduct of Government litigation, it was eminently proper for him to suggest an amendment designed to put the production order "in proper posture for review on appeal" (R. 332), *i. e.*, the posture where review of this important public question could be had without requiring the chief law enforcement officer to sacrifice an important public interest (see *supra*, pp. 18–19). Here, as in *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794–795, n. 1, "[t]he record fails to sustain appellees' contention that the Government invited the court to enter this order * * * dismissing the action."

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[12] Lever suggests (Motion, p. 13) that the Government should have sought review of the original production orders by extraordinary writ; and it states (*ibid.*) that, had the Government done so, "[t]here can be little doubt that it would have obtained a stay from either the trial judge or this Court." However, in the district court Lever "subscribe[d]" (R. 336) to a written statement filed by Procter (in response to the Government's motion) which stated (R. 324; see R. 335) that Procter would have opposed the Government's alternative request for a stay.

Lever further suggests (Motion, p. 13) that the Government could have complied with the production order, and tested its validity in connection with review of the final judgment on the merits. But if the Government had complied with the order, the question of its validity obviously would have been moot. Furthermore, compliance would have breached the very grand jury secrecy which the Attorney General had determined the public interest required to be preserved.

II. THE DISTRICT COURT ERRED IN DIRECTING PRODUCTION OF THE GRAND JURY TRANSCRIPT

Rule 34 of the Federal Rules of Civil Procedure provides that upon motion of any party "showing good cause therefor" the court may order a party to produce any documents "not privileged"[13] which constitute or may furnish evidence relevant to the subject matter of the proceeding. See also Rule 26 (b). As this Court stated in *Hickman* v. *Taylor*, 329 U. S. 495, 512, note 10, "Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents." Since the court's discovery order rested on Rule 34,[14] the court did not properly direct production unless appellees had shown "good cause."

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[13] In connection with the Government's motion for reconsideration, the Attorney General filed in the court below a formal claim of privilege covering the grand jury transcript (R. 247–249), which the district court denied (R. 261–267). We are not here arguing that the transcript is privileged against disclosure, but only that appellees have not shown good cause for its production. But see note 16, *infra*, p. 33.

[14] Colgate's motion for production was filed under Rule 6 (e) of the Federal Rules of Criminal Procedure (R. 133); the other motions presumably were filed under Rule 34 of the Federal Rules of Civil Procedure. However, as Colgate recognizes (R. 142; Colgate Motion to Dismiss or Affirm, p. 25), and as the district court indicated (R. 138), Rule 6 (e) only authorizes the district court to permit disclosure of matters occurring before the grand jury; it does not authorize discovery of the transcript in a civil case. The district court accordingly correctly treated all the discovery motions as requiring a showing of "good cause" under Rule 34.

The district court held (1) that since the Government was using the transcript in preparing for trial, and since the transcript "would be useful to defendants during their preparation for trial," "clearly, the ends of justice will be attained by plaintiff's disclosure of the grand jury testimony, and defendants have shown good cause for the production of the transcripts" (R. 213)[15]; and (2) that "none of the reasons" for the "traditional secrecy" (*ibid.*) of grand jury transcripts "applies in this case" (R. 214; see also the court's opinion on reconsideration, (R. 258). The court further stated (R. 217) that it would not grant discovery if "defendants already possessed all the necessary information or could obtain it by pursuing a different remedy."

We submit that these rulings rest upon a misconception of (1) the "good cause" standard under Rule 34, and (2) the policy upon which grand jury secrecy is based.

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[15] The court relied on this Court's statement in *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 234, that, after the grand jury's function has ended, disclosure of grand jury testimony is proper "where the ends of justice require it." It stated (R. 208) that "if the ends of justice require disclosure of the grand jury testimony, that is good cause for the production of the transcripts."

The statement in *Socony-Vacuum*, however, was made in rejecting the contention that the district court had erred in a criminal case in permitting the Government to use particular portions of a grand jury transcript to refresh a witness's recollection, without permitting defense counsel to see the transcript. The question here involved is what constitutes "good cause" in a civil antitrust case for discovery of an entire grand jury transcript.

Grand jury proceedings traditionally have been secret, and the courts have zealously protected such proceedings from exposure (see *infra*, pp. 38–40). A party seeking discovery of such material is, we believe, required to make an unusually strong, and a particularized, showing that he cannot effectively try his case without breaching such secrecy. Good cause is not established merely by showing that the Government is using the transcript to prepare for trial, and that it would be "useful" to the defendants to have all of it. We believe that discovery of material contained in a grand jury transcript may be directed in a civil case only upon a clear showing that it is essential to the proper preparation and presentation of the movant's case, and that he either cannot obtain the facts elsewhere, or can do so only with serious hardship. Appellees plainly did not, or even attempt to, make such a showing, albeit they have made a blanket pretrial demand for the transcript.

In determining whether good cause has been established, the character of the material sought is highly significant. If merely routine papers are involved, a lesser showing of need may suffice than if discovery is sought of material with respect to which there are strong policy considerations against permitting discovery. As we shall show, important considerations of public policy dictate against disclosure of the transcript.[16] In the light of these policies, we submit that appellees failed to show good cause.

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[16] The claim of privilege filed by the Attorney General in the court below attests to the importance which the Government's chief law enforcement officer attached to maintaining the secrecy of the grand jury transcript in this case. It further empha-

The issue of disclosure, as it arises here, is, of course, quite different from the situation where limited access to specific material in the Government's hands is sought *at trial* for purposes of impeaching a witness. See *Jencks* v. *United States*, 353 U. S. 657. Here, appellees have sought access to the entire transcript, long prior to trial, for use in their pretrial preparation, and without any particularized showing of need.

A. In *Hickman* v. *Taylor*, 329 U. S. 495, this Court enunciated the standards governing discovery of material in situations where there are strong public policies weighing against disclosure. There, in a suit for personal injury under the Jones Act, the plaintiff sought to compel production of oral and written statements of witnesses which had been taken by the defendants' attorney shortly after the accident and in anticipation of possible litigation. "No attempt was made to establish any reason why Fortenbaugh [the defendants' attorney] should be forced to produce the written statements. There was only a naked, general demand for these materials as of right * * *" (p. 512). The district court directed production "on the theory that the facts sought were material and were not privileged (as constituting attorney-client com-

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sizes that appellees were required to make a particularly strong showing of need before they could breach such secrecy. Cf. *United States* v. *Reynolds*, 345 U. S. 1; see the recent opinion of Mr. Justice Reed, sitting by designation on the Court of Claims, in *Kaiser Aluminum & Chemical Corporation* v. *United States*, No. 102–54, Jan. 15, 1958.

munications" (p. 509). This Court, although agreeing that the "memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis" (p. 508), concluded that the district court had erred in directing production.

The Court stated that "permitting discovery in a situation of this nature as a matter of unqualified right" (p. 514) would contravene "the public policy underlying the orderly prosecution and defense of legal claims" (p. 510). It summarized the policy considerations which require preservation of the privacy of a lawyer's "work product" as follows (pp. 510–511):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the

> "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

In the light of these policies, the Court, although recognizing that "the deposition-discovery rules are to be accorded a broad and liberal treatment" (p. 507), held that the plaintiff had not established "adequate reasons" (p. 512) for production. It noted (p. 508) that plaintiffs sought "statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired"; that such production was sought only "after making the most searching inquiries of his opponents as to the circumstances surrounding the fatal accident" (*ibid.*); and that the ground upon which production was sought of the oral statements—"to help prepare" petitioner's counsel "to examine witnesses and to make sure that he has overlooked nothing"—"is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of Fortenbaugh's professional activities. If there should be a rare situation justifying production of these matters, petitioner's case is not of that type (p. 513)."

The Court emphasized (pp. 511–512) that it was not ruling "that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. * * * And production might be justified where the witnesses are no longer available or can be reached only with difficulty. * * * But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."

The Court of Appeals for the Third Circuit, sitting *en banc* in *Alltmont* v. *United States*, 177 F. 2d 971, 978, certiorari denied, 339 U. S. 967, ruled that, in the light of this Court's opinion in *Hickman* v. *Taylor*, a party seeking to establish good cause under Rule 34 for discovery of written statements of prospective witnesses which were taken for trial counsel's use

> must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and

> interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case. * * *

B. The public policy against breaching the secrecy of grand jury proceedings is certainly no less strong than the policy of preserving the privacy of a lawyer's "work product."[17] It has been an historic principle that grand jury proceedings shall be conducted in secrecy. See *United States* v. *Johnson*, 319 U. S. 503, 513; *Costello* v. *United States*, 350 U. S. 359, 362; compare Judge Learned Hand's opinion in *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.). Various settled legal principles are designed to protect that secrecy. Thus, grand jurors and Government attorneys, interpreters or stenographers appearing before the grand jury may disclose what occurred there only with court authorization. Rule 6 (e), Federal Rules of Criminal Procedure. Furthermore, the grand jury transcript is not made public save in exceptional circumstances where breach of secrecy is "essential to the attainment of justice and the vin-

[17] Indeed, since the grand jury transcript reflects the legal skill of Government attorneys in preparing and conducting the proceeding, it may in a sense be viewed as their work product. Cf. *United States* v. *Deere & Co.*, 9 F. R. D. 523, 527–528 (D. Minn.); *Molloy* v. *Trawler Flying Cloud*, 10 F. R. D. 158 (D. Mass.); *United States* v. *Singer*, 19 F. R. D. 90, 92–93 (S. D. N. Y.).

dication of truth * * *." *Schmidt* v. *United States*, 115 F. 2d 394, 396 (C. A. 6).[18]

The reasons for maintaining grand jury secrecy were cogently summarized in *United States* v. *Rose*, 215 F. 2d 617, 628 (C. A. 3) as follows:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information

[18] In the federal courts, only three exceptions have been recognized: (1) the transcript may be available in certain circumstances to impeach a witness by showing prior contradictory statements (cf. *Randazzo* v. *United States*, 300 Fed. 794, 797 (C. A. 8); *Young* v. *United States*, 214 F. 2d 232, 239 (C. A. D. C.)) or to refresh his recollection (*United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 234); (2) the defendant may see the transcript where certain types of irregularities in the grand jury proceedings are alleged to have invalidated the indictment (*Shushan* v. *United States*, 117 F. 2d 110, 113 (C. A. 5) certiorari denied, 313 U. S. 574); (3) the defendant may examine his own testimony in a trial for perjury committed before the grand jury (*United States* v. *Remington*, 191 F. 2d 246, 250 (C. A. 2), certiorari denied, 343 U. S. 907; *United States* v. *Rose*, 215 F. 2d 617, 629–630 (C. A. 3)). In addition, disclosure occasionally may be authorized in other situations. See, *e. g.*, *United States* v. *Southmayd*, 27 Fed. Cas. 1275, No. 16,361 (Cir. Ct. E. D. Wisc.) (malicious prosecution where the cause of action is based on the actions of grand jury witnesses in procuring an indictment).

> with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

See, also, *Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9).

In *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D. Md.) (upon which the court relied in *Rose*) the court pointed out:

> It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury. Of course, these latter are intended directly to share in the benefits from this rule of secrecy, * * *.

The importance of protecting the grand jury as an institution was also emphasized by the court in denying production of grand jury transcripts in *United States* v. *General Motors Corp.*, 15 F. R. D. 486, at 487–488 (D. Del.).

The district court held (R. 214) that "none of the[se] reasons for secrecy * * * applies in this case." We think it clear, however, that the fundamental policy of encouraging "free and untrammeled disclosures by persons who have information with respect to the commission of crimes" would be seriously thwarted by permitting disclosure of the grand jury transcript even though the grand jury has been discharged without returning an indictment. Wit-

nesses who appear before the grand jury often testify as informers, and they obviously would be less likely to do so if such testimony were to be made public. This consideration is particularly significant in the antitrust field, where such witnesses frequently are persons who, because of their connection or economic relationships with potential defendants, might hesitate to appear and speak freely before the grand jury if their testimony might later be disclosed and thus subject them to possible economic retaliation. Cf. *United States* v. *Deere & Co.*, 9 F. R. D. 523, 525–529 (D. Minn.). Moreover, unless secrecy were maintained, witnesses might decline to disclose adverse facts about third persons whom they believe to be innocent, or to disclose their own covert relationships with persons of unsavory reputation.[19]

The foregoing policy considerations are particularly applicable to this case. Twenty-four of the 28 witnesses who testified before the grand jury (all of them under compulsion of subpoena) were past or present officers or employees of appellees, or were connected with firms which presumably had some business rela-

[19] These policy considerations are akin to those which underlie the well-established privilege covering the identity of informers: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States*, 353 U. S. 53, 59.

tions with them.[20] Since their economic well-being thus was so closely dependent upon maintaining favorable relations with appellees, those witnesses might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public.

These considerations against breaching grand jury secrecy obviously are equally applicable even though the grand jury had been discharged without returning an indictment.

In recognition of this important policy that grand jury secrecy must be maintained so "that those who testify may feel free to speak the truth without reserve" (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9)), the courts (except for the decision below) consistently have rejected attempts by the defendants in Government civil antitrust cases to obtain discovery of grand jury transcripts.[21] Requiring the

[20] Nine were present and nine were former officers or employees; two were representatives of grocery chain stores; two were representatives of oil and chemical companies; one was a representative of a meat packer, and one was a representative of a tallow broker (R. 471–472).

[21] Discovery of grand jury transcripts after discharge of the grand jury has been refused in the following antitrust cases: *United States* v. *Radio Corporation of America*, 21 F. R. D. 103 (E. D. Pa.); *United States* v. *Maryland & Virginia Milk Producers' Assn.*, Civil Action No. 4482–56, unreported ruling of Judge Holtzoff (D. D. C. February 3, 1958); *United States* v. *Standard Oil of California*, Civil Action No. 11584–C, unreported ruling of Judge Carter sustaining Government's claim of privilege and reversing prior ruling (R. 502–505) permitting disclosure as to witnesses who consented (S. D. Cal., March 30, 1956) (R. 356–359); *United States* v. *Darling*, Civil Action No. 52–C–1716, unreported decision of Judge Perry (N. D. Ill.

Government to disclose grand jury transcripts in a civil case, without a clear showing of compelling need therefor, would "subvert the functions of federal grand juries" just as much as the attempt to examine into the workings of a grand jury which this Court rejected in *United States* v. *Johnson,* 319 U. S. 503, 513, as an unwarranted "intrusion * * * into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty * * *." In that case, the Court explicitly warned against devices which some of the states "have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes" (p. 513).

Even in a criminal case, a defendant cannot obtain the transcript of his own grand jury testimony as of right (*Goodman* v. *United States, supra,* p. 519), but only upon a clear showing that "strict application" of the traditional secrecy rule "would defeat the ends of

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Nov. 18, 1955); *United States* v. *Morgan*, Civil Action No. 43–757, unreported ruling of Judge Medina (S. D. N. Y. Dec. 8, 1948) (R. 351–354).

In *United States* v. *General Motors Corp.*, 15 F. R. D. 486 (D. Del.), a civil action under the Elkins Act, the court similarly refused discovery of a grand jury transcript involving an investigation of the same conduct.

The only other civil case brought by the Government which we have found where the court directed discovery of a grand jury transcript is *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D. N. J.). There, however, the court directed production of the transcript of the testimony of only those witnesses who were to take the stand at trial and for the stated purpose of aiding the defense in examining them there. The question of possible production of the grand jury transcript for use by appellees in impeaching witnesses at the trial (cf. *Jencks* v. *United States*, 353 U. S. 657) obviously is not now before the Court.

justice." *United States* v. *Rose*, 215 F. 2d 617, 628–29 (C. A. 3); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. A *fortiori*, disclosure of grand jury testimony may be ordered in a civil case only upon the most compelling showing of necessity. As we shall now show, appellees have utterly failed to make such a showing.

C. In support of their motions for production of the grand jury transcript, appellees alleged: (1) that the Government was using the transcript (Procter, R. 119; Association, R. 129); (2) that the "information" contained therein was "necessary * * * for an adequate preparation of its defenses to this action, and is relevant to the matters alleged in the complaint," and that "[m]atters pertinent" to the defense "will never become known * * * unless access to the Grand Jury transcripts is granted" (Procter, R. 119–120; see the Association's substantially identical statement, R. 130); (3) that "[n]o need exists for preserving the secrecy" of the transcripts (Procter, R. 119), and that "no privilege of secrecy attaches to the testimony of a witness before the grand jury" (Lever, R. 135); (4) that Lever "is urgently in need of access to such testimony in order to discover * * * the evidentiary basis, if any, for the charges in the complaint and to prepare its defense to such charges" (Lever, R. 135); and (5) that "no practicable alternative to such discovery exists * * * because to attempt to obtain such discovery through depositions of such witnesses would necessarily involve substantial cost and severe inconvenience to all parties, would gravely retard the ex-

peditious preparation of this cause for trial, and would not in any event produce accurate information because of the lapse of time and other factors" (Lever, R. 135). Procter conceded (R. 119) that it had known "for many months" the names of "most if not all" of the witnesses who appeared before the grand jury; the Association stated (R. 130) that it "believes that the names of most, if not all," of such witnesses "have been known for some time."

These allegations fell far short of constituting "adequate reasons to justify production" (*Hickman* v. *Taylor, supra,* p. 512) of material which traditionally has been carefully safeguarded against disclosure. Appellees did not establish that "production of * * * facts" which "remain hidden in" the grand jury transcript "is essential to the preparation of [their] case" (*id.,* p. 511), or that "denial of such production would unduly prejudice the preparation of" their "case or cause * * * [them] any hardship or injustice" (*id.,* p. 509).

1. The mere conclusory allegations that the "information" contained in the transcript is "necessary" to the preparation of the case, and that "[m]atters pertinent" to the defense "will never become known * * * unless access to the Grand Jury transcripts is granted," do not establish "good cause." Since such stereotyped "showings" always could be made, the effect of treating them as sufficient to justify production would be to read the "good cause" requirement out of Rule 34. As the court stated in *Martin* v. *Capital Transit Co.,* 170 F. 2d 811, 812, 814 (C. A. D. C.), in upholding denial of a motion for produc-

tion under Rule 34 for failure to meet the standard of *Hickman* v. *Taylor*,

> Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party "*showing* good cause," not upon a mere allegation or recitation that good cause exists. * * * It was the duty of the appellant explicitly to show in his motion or by a supporting affidavit the need of the report for the purposes of the trial.

2. The claim that "no practicable alternative to such discovery exists" is not borne out by the record. The purpose of the discovery provisions of the Federal Rules of Civil Procedure is to enable the "parties to obtain the fullest possible knowledge of the issues and *facts* before trial" (*Hickman* v. *Taylor*, p. 501, emphasis added). Appellees could have obtained all pertinent *facts* without recourse to the grand jury transcript.

The Government had furnished them with lengthy and detailed statements of the facts upon which it was relying, and had disclosed to them a substantial portion of its documentary evidence (see Statement, *supra*, pp. 7–8). Appellees conceded (R. 119, 130, 339, see 471) that they knew the identity of "most, if not all" of the witnesses who had appeared before the grand jury, and the Government had offered to disclose the names of all grand jury witnesses (R. 294). A majority of the witnesses were or had been officers or employees of appellees (R. 471). There was no showing that those witnesses were unavailable, or that appellees could not interview them or take their

depositions, or that they had not done so.[22] Indeed Lever admitted that "there is nothing to prevent the defendants from taking the depositions of all persons having knowledge of the case, including all witnesses who testified before the grand jury" (R. 464–465); Colgate conceded that "[w]e could take the depositions of the witnesses whose names we know" and that by "questioning each of them about each of the very broad issues of the complaint we could cover most or all of the subjects that could have been raised before the grand jury" (R. 478); and the Association stated (R. 162) that it could "take their depositions, if we knew who they were." There was thus no claim, let alone a showing, that the grand jury "witnesses are no longer available or can be reached only with difficulty." *Hickman* v. *Taylor, supra,* p. 511.[23]

In sum, the situation here is comparable to *Hickman* v. *Taylor, supra,* p. 509, where, "[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already through the

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[22] One of the witnesses had died subsequent to the grand jury proceedings (R. 472, 535), but that was not the basis of appellees' demand for the transcript of his testimony. There was no showing that appellees had not already interviewed him, or that the facts with respect to which he had testified were not otherwise available or even that he had any information relevant to the issues in this case.

[23] Although Lever alleged (R. 135) that taking depositions would entail substantial cost and severe inconvenience, and would not produce "accurate information because of the lapse of time and other factors," it set forth no facts to substantiate the contention. The mere inconvenience and expense of conducting deposition proceedings is not sufficient to establish good cause for breaching grand jury secrecy.

interrogatories [extensive pretrial disclosures by the Government] or is readily available to him direct from the witnesses for the asking." See, also, *United States* v. *General Motors Corp.*, 15 F. R. D. 486, 488 (D. Del.).

Indeed, it would appear that what appellees were seeking through discovery of the grand jury transcript was not to ascertain the *facts* upon which the Government's case was based (since they either already had such facts, or could readily obtain them), but to ascertain exactly how prospective witnesses had cast their testimony. This purpose is reflected by the circumstances under which the motions for discovery were first pressed. Initially, only Procter filed such a motion, and it did not notice it for hearing. Procter did nothing further about the motion for a year, until the Government had sought to take the deposition of one of its officials who had been a grand jury witness. He refused to answer any questions with respect to matters about which he had testified before the grand jury "until such time as relevant portions of the grand jury transcript are available" (see Statement, *supra*, p. 9). Shortly thereafter, Procter moved for a hearing on its discovery motion, and the other appellees filed similar motions. It would appear, therefore, that Procter pressed its discovery application not because it had been unable to ascertain the facts upon which the Government's case was based, but "to know what our man said at that time * * * [and] to give us some advance warning of any material change in his state-

ment * * *." *Safeway Stores* v. *Reynolds,* 176 F. 2d 476, 478 (C. A. D. C.).

To permit discovery for such purpose would subvert the salutary policy of the Federal deposition-discovery rules to increase the "[m]utual knowledge of all the relevant facts gathered by both parties [which] is essential to proper litigation." *Hickman* v. *Taylor,* p. 507. It could lead to the abuses foreseen in *Margeson* v. *Boston & Maine Railroad,* 16 F. R. D. 200, 201 (D. Mass.):

> If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in "knowing the truth before trial" is prompted by a desire to find the most plausible way to defeat the truth. For this, and for other reasons, I believe the requirement of good cause for compulsory pretrial production should mean more than mere relevancy and competency, or ordinary desirability from the standpoint of the movant, and should be something in the nature of special circumstances. * * *

The fact that the Government was using the transcript in preparing the civil suit for trial does not mean that a lesser showing will suffice to establish good cause. For in virtually every case the material sought to be discovered is being used by the adverse party. That was certainly true in *Hickman* v. *Taylor.* Yet there the Court indicated that discovery of traditionally protected material would be granted only upon a showing of extraordinary need.

There can be no doubt as to the propriety of the Government's using the grand jury transcript in preparing the civil antitrust case. Conduct violating Sections 1 and 2 of the Sherman Act may give rise to criminal or civil proceedings, or both. The Attorney General therefore has the duty to institute criminal proceedings when appropriate, and also to "institute proceedings in equity to prevent and restrain such violations" (Section 4). While the Government does not institute grand jury proceedings unless it has reasonable grounds for anticipating an indictment, it cannot always be foretold whether the evidence ultimately produced will justify a criminal case or be merely sufficient to support civil proceedings. Moreover, in particular cases it may be difficult to determine, before all the evidence is weighed, whether criminal, or civil, or both proceedings are best fitted to dissipate past, and deter future, transgressions. Where, as in the instant case, no indictment is returned, the consequence plainly cannot be to preclude the Attorney General from pursuing the alternative civil remedies provided by the statute. And in pursuing such civil remedies, the Attorney General should not be deprived of the right to use evidence properly and lawfully secured, in carrying out his statutory "duty" to conduct "proceedings in equity to prevent and restrain" Sherman Act violations.[24]

[24] There is no substance to the charges that the grand jury was "use[d] to prepare and try a civil action", (Colgate Motion to Dismiss or Affirm, p. 29), and that the "grand jury investigation which preceded the filing of the civil complaint * * * was a device employed by the United States to gather infor-

The contention that it would be improper for the Government to use evidence obtained through grand jury proceedings in a subsequent civil antitrust suit recently was rejected in *In re Petroleum Industry Investigation*, 152 F. Supp. 646 (E. D. Va.). In denying a motion to limit the Government's use of documents to be produced pursuant to grand jury subpoenas to the pending criminal proceedings, the court there stated (p. 647):

> A civil suit predicated on antitrust or similar legislation, when brought by the Government, is in fact and in law a prosecution. Its aim is not compensation but correction. The obligation of the Justice Department to invoke civil remedies in an appropriate situation is just as bounden as its duty to institute requisite criminal proceedings. Consequently, if books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them to use for that purpose the information in their hands. This is nonethe-

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mation and for purposes of discovery" (Lever Motion to Dismiss or Affirm, p. 25). The district court correctly rejected a similar charge when Procter sought to suppress certain documents which the Government had obtained from it through grand jury subpoenas, on the ground that the Government "used the criminal investigation as a pretense for obtaining documents upon which to base a civil case" (R. 75). In denying the motion, the district court ruled that "[t]he assertion has not been substantiated" (*ibid.*). The charge by Lever and Colgate is likewise unsubstantiated, and has no basis in the record.

> less true though no process available in a civil action has the competency to discover this data beforehand.

These considerations are equally applicable to use of the grand jury transcript. See, also, an earlier opinion of the court below in the instant case, *United States* v. *Procter & Gamble Co.*, 14 F. R. D. 230, 233; R. 221–224.

The short of the matter is that appellees have not shown that their case is the "rare situation justifying production" (*Hickman* v. *Taylor, supra,* p. 513), in advance of the trial, of traditionally secret grand jury transcripts. If the kind of showing which appellees here made—that "the transcripts would be useful" to them "during their preparation for trial" (R. 213)—establishes good cause for blanket production of grand jury transcripts in a civil antitrust case, it would be the rare antitrust case in which the defendants could not obtain the entire transcript. As we have noted (see *supra,* n. 21, p. 42), however, the consistent course of judicial decision has been to deny such discovery. The standard of "good cause" applied by the district court in this case would permit such easy and unlimited access to grand jury transcripts as seriously to interfere with the effective functioning of the grand jury as a law enforcement institution. Whether, and to what extent, developments at the trial would warrant disclosure of pertinent portions of the transcript, *e. g.*, for use in cross-examination of Government witnesses who also appeared before the grand jury, presents questions not now before this Court. We rec-

ognize that a materially different situation might be presented *at the trial* if disclosure should be sought on the basis of the specific, concrete matters developed at the trial. In the latter situation the district court could exercise a "sound discretion", giving weight to the needs of the defense as well as the public interest in preserving the secrecy of grand jury proceedings, in determining whether particular portions of the transcript should be made available under "some appropriate procedure * * * adopted to prevent its improper use". *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 233.

CONCLUSION

The judgments of the district court dismissing the complaint for failure to produce the grand jury transcript should be reversed.

Respectfully submitted.

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